

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

75-1109 ^B

To be argued by
JONATHAN J. SILBERMANN ^{PJS}

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

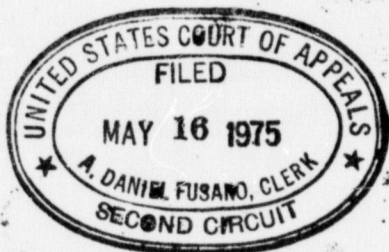
ADOLPHO RIVERA,

Appellant.
-----X

Docket No. 75-1109

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ADOLPHO RIVERA

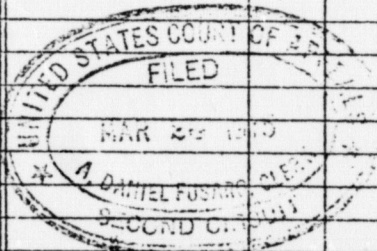
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,
Of Counsel

PAGINATION AS IN ORIGINAL COPY

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For U. S.:
vs.		Thomas M. Fortuin, AUSA.
1. RAFAEL FONTANEZ-all cts.		791-0932
2. ADOLPHO RIVERA- 1-6		
		3-11-78
		For Defendant:
		75-1109

(12) STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk				
J.S. 3 mailed	Marshal				
Violation	Docket fee				
Title					
Sec. (see below)					



DATE	PROCEEDINGS
18:1117, 1114 & 1111	Consp. to murder Fed. officer. (Ct. 1)
18:2114	Attempted robbery of Govt. property. (Ct. 2)
18:2114&2	Use of dangerous weapon dur. the commission of robbery. (Ct. 3)
18:111	Assault on Fed. officer & employee. (Ct. 4)
18:111&2	Use of deadly and dangerous weapon. (Ct. 5)
18:924(c)(1)	Use of firearm to commit a felony. (Ct. 6)
18:922(b)(1)&924(a)	Possess. of firearm while under indictment. (Ct. 7)
1-16-75	Filed indictment. (superseding 74 Cr 1013 and assigned to Wyatt, J.)
1-27-75	Court directs the entry of a not guilty plea for both deft's (attys present). Hearing held as to deft. Rafael Fontanez. The Court finds the deft. Rafael Fontanez to be insane or otherwise incompetent to stand trial. The Court commits the deft. Rafael Fontanez to the custody of the Attorney General, until he shall be mentally competent to stand trial or he is otherwise discharged according to law. Govt's. motion to sever Rafael Fontanez at trial "Granted". Trial begun as to deft. Adolpho Rivera. Both sides rest. Deft's. motion for a judgment of acquittal as to counts 1 and 6. Decision reserved.....Wyatt, J.

TMF:lq
74-3316
n-708

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

RAFAEL FONTANEZ, a/k/a "Lefty," and
ADOLPHO RIVERA,

Defendants.

INDICTMENT

S 74 Cr.

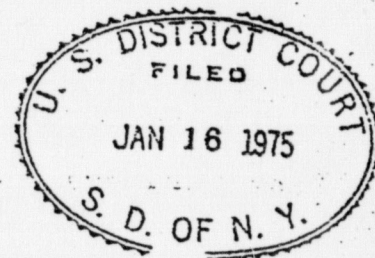
75 CRIM. 44

COUNT ONE

Conspiracy to Murder

The Grand Jury charges:

1. From on or about the 1st day of October, 1974 and continuously thereafter up to and including the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ, a/k/a "Lefty", and ADOLPHO RIVERA, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Section 1114 of Title 18, United States Code.



2. It was part of said conspiracy that said defendants unlawfully, intentionally and knowingly would murder and willfully, deliberately, maliciously and with premeditation kill Jerry Castillo, a Special Agent of and an officer and employee of the United States Department of Justice, Drug Enforcement Administration, while Jerry Castillo was engaged in and on account of the performance of his official duties, in violation of Section 1114 of Title 18, United States Code.

3. It was a further part of said conspiracy that said defendants unlawfully, intentionally and knowingly would commit the murder set forth in paragraph two (2) hereof in

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the perpetration of, and in the attempt to perpetrate, a robbery, to wit, the robbery set forth in Counts Two (2) and Three (3) of this Indictment.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

1. On October 17, 1974, the defendant RAFAEL FONTANEZ told Jerry Castillo and another that he could deliver one-half pound of heroin.
2. On or about October 18, 1974, the defendant RAFAEL FONTANEZ met Jerry Castillo in the vicinity of 163rd Street and the Grand Concourse, Bronx, New York.
3. On or about October 18, 1974, the defendant RAFAEL FONTANEZ and Jerry Castillo drove to the vicinity of 196th Street and Colonial Avenue, New York, New York.

4. On or about October 18, 1974, the defendant RAFAEL FONTANEZ met the defendant ADOLPHO RIVERA in the vicinity of 196th Street and Colonial Avenue, New York City.

5. On or about October 18, 1974, in the vicinity of 196th Street and Colonial Avenue, New York, New York, the defendant RAFAEL FONTANEZ possessed a loaded .38 caliber revolver.

6. On or about October 18, 1974, in the vicinity of 196th Street and Colonial Avenue, New York, New York, the defendant ADOLPHO RIVERA possessed a pair of handcuffs.

7. On or about October 18, 1974, in the vicinity of 196th Street and Colonial Avenue, New York, New York, defendant ADOLPHO RIVERA held Jerry Castillo's hands behind his back while the defendant RAFAEL FONTANEZ pointed the loaded .38 caliber revolver at Jerry Castillo.

(Title 18, United States Code, Sections 1117, 1114, 1111.)

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COUNT TWO

Robbery of Money of
the United States

The Grand Jury further charges:

On or about the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ, and ADOLPHO RIVERA, the defendants, unlawfully, wilfully and knowingly did assault Jerry Castillo, a person having lawful charge, control and custody of money and property of the United States, to wit, fourteen thousand dollars (\$14,000) of official Advance Funds, with intent to rob, steal and purloin such money and property of the United States.

(Title 18, United States Code, Section 2114
and Section 2.)

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COUNT THREE

Use of a Dangerous Weapon

The Grand Jury further charges:

On or about the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ, and ADOLPHO RIVERA, the defendants, in effecting and attempting to effect the robbery charged in Count Two of this Indictment, unlawfully, wilfully and knowingly did put in jeopardy the life of Jerry Castillo by use of a dangerous weapon, to wit, a thirty-eight caliber revolver.

(Title 18, United States Code, Section 2114
and Section 2.)

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COUNT FOUR

Assault on a Federal Officer
and Employee

The Grand Jury further charges:

On or about 18th of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ and ADOLPHO RIVERA, the defendants, unlawfully, wilfully and knowingly, did forcibly assault, resist, oppose, impede, intimidate and interfere with Jerry Castillo, an officer and employee of the Drug Enforcement Administration, while Jerry Castillo was engaged in and on account of the performance of his official duties.

(Title 18, United States Code, Sections
111, 1114 and Section 2.)

COUNT FIVE

Use of a Deadly and Dangerous
Weapon

The Grand Jury further charges:

On or about the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ and ADOLPHO RIVERA, the defendants, unlawfully, wilfully and knowingly, did, in the commission of the acts charged in Count Four of this Indictment, use a deadly and dangerous weapon.

(Title 18, United States Code, Sections
111 and 2.)

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COUNT SIX

Using and Carrying a Firearm
During the Commission of a Felony

The Grand Jury further charges:

On or about the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ, and ADOLPHO RIVERA, the defendants, unlawfully, wilfully and knowingly did use a firearm to commit and did carry a firearm unlawfully during the commission of a felony for which each may be prosecuted in a court of the United States, to wit, the felonies charged in Counts One (1) of this Indictment.

(Title 18, United States Code, Section
924(c)(1) and 924(c)(2) and 924(a).)

COUNT SEVEN

Receiving a Firearm While
Under Indictment

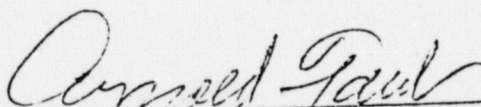
The Grand Jury further charges:

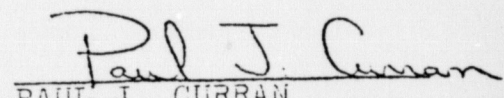
On or about the 18th day of October, 1974, in the Southern District of New York, RAFAEL FONTANEZ, the defendant, who

1) was under indictment in the Supreme Court of the State of New York, Kings County, for a crime punishable by imprisonment for a term exceeding one year, to wit, possession of a dangerous weapon, a Class E felony; and

2) was under indictment in the New York State Special Narcotics Court for a crime punishable by imprisonment for a term exceeding one year, to wit, the criminal sale of dangerous drugs in violation of New York Penal Law Section 220.35, did unlawfully, wilfully and knowingly receive a firearm and ammunition, to wit, a loaded thirty-eight caliber fiveshot revolver, serial number Q055670, manufactured by R G Industries, which firearm and ammunition had been shipped and transported in interstate commerce.

(Title 18, United States Code, Section
922(h)(1) and 924(a).))


Foreman


PAUL J. CURRAN
United States Attorney

MAR 7 1975

(Reporter - Eugene Lewis - T. Fortson, U.S.A. - and Gerling Eng)
Sentence.

Deft. Adolpho River (atty. present) (Counts 2 and 3 are offenses)

TWENTY-FIVE (25) YEARS, on count 3, but so much of the sentence of imprisonment as exceeds FIFTEEN (15) YEARS, is suspended and defendant is placed on probation for a period of ONE (1) DAY.

(Counts 4 and 5 are one offense)

TEN (10) YEARS, on count 5, to run concurrently with the sentence imposed on count 3.

S

W. J. H. D.

FILED
CLERK
U.S. DISTRICT COURT
NORTH DAKOTA
FEB 11 1975
J. L. Thompson

75 CRIM. 44

Form No. USA-33a-274 (Ed. 9-25-58)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

RAFAEL FONTANEZ, a/k/a "Lefty,"
and ADOLFO RIVERA,

Defendants.

INDICTMENT

S 74 Cr.

PAUL J. CURRAN

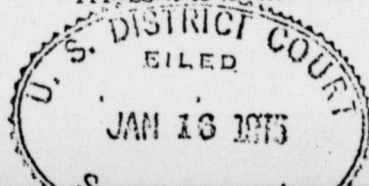
United States Attorney

A TRUE BILL

Armed Rob

Foreman

FPI-88-1-13-70-20M-4025



JAN 27 1975

JUDGE WYATT

Court directs the entry of a Not Guilty plea for both defendants (attys present). Hearing held as to Def. Rafael Fontanez. The Court finds that def. Rafael Fontanez to be insane or otherwise incompetent to stand trial. The Court commits the def. Rafael Fontanez to the custody of the atty. General, until he shall be mentally competent to stand trial or he is otherwise discharged according to law.

Def's motion to sever Rafael Fontanez at trial "Granted" with a jury. Trial begun as to def. Adolfo Rivera, both sides rest. Def's motion for a judgment of acquittal as to counts 1 and 6. Decision Reserved.

JAN 28 1975 Trial cont'd. Court grants def's motion for a judgment of acquittal as to counts 1 and 6.

Summaries & Charge. Jury finds the def. guilty on each of counts 2, 3, 4 & 5. Sentenced Mar. 7, 1975, 2:30 P.M. Pre-Sent. Invert. ordered. Def. remanded in lieu of bail \$5,000. cash or surety previously fixed on indict. #74C.1013. *cr. att. J.*

(over)

CHARGE OF THE COURT

WYATT, J.

THE COURT: Madam Foreman, and ladies and gentlemen of the jury:

This case is about to be submitted to you for your decisions on the issues of fact here involved and, of course, your decisions on those facts determine whether your verdict as to this defendant, Mr. Rivera, is guilty or not guilty. In making your decisions you act as ministers of justice and you discharge an obligation of citizenship which is not too much to call sacred.

In making your decisions you should act with complete fairness and impartiality, appraising the evidence calmly and objectively, and without any bias or prejudice for or against the Government or for or against the defendant.

You are the sole and exclusive judges of the evidence. You are the sole and exclusive judges of the facts. You decide all conflicts and differences in the evidence. You draw whatever reasonable inferences are justified from the facts as you may find those facts to be.

My function at this point is to give you instructions as to the applicable law, and your duty is to take those instructions and apply them to the facts as you

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2 may find those facts to be. You must, in so determining,
3 rely upon your own recollection of the testimony and other
4 evidence.

5 What counsel said in their arguments this
6 morning or at any other time during the trial and what I may
7 say as to any fact or as to any testimony or any evidence is
8 not binding on you and it is not to be taken in place of
9 your own recollection, which is what controls.

10 Also, the fact that rulings have been made on
11 matters of evidence, motions and the like, by the Court
12 during the trial is not to be taken as any indication that
13 the Court has any opinion whatsoever as to the guilt or the
14 innocence of the defendant or the credibility of any
15 witnesses.

16 I believe I may have asked a few questions of
17 one or more witnesses. If so, it is only with the object of
18 making something clear or clearer to the jury, and it is not
19 certainly to be taken as any indication of any opinion by me
20 as to the guilt or innocence of the defendant or the
21 credibility of any witness.

22 The indictment, as I reminded the jury and I
23 emphasized earlier, is an accusation. It is not evidence
24 and is not proof of the guilt of the defendant. He has
25 pleaded not guilty. The Government has the burden of proof

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2 to establish the charges in the indictment, and the charges
3 are contained in Counts 2, 3, 4, and 5 being submitted to the
4 jury. The burden is on the Government to establish those
5 charges by proof beyond a reasonable doubt.

6 The defendant does not have to prove his
7 innocence. He is presumed to be innocent of the charges in
8 the indictment, and that presumption continues until when,
9 as and if you, the jury, are satisfied that the Government
10 has proved the guilt of the defendant as to any such charge
11 beyond a reasonable doubt.

12 The expression "beyond a reasonable doubt," what
13 does it mean? We say it is a doubt founded on reason and
14 arising from the evidence or lack of evidence. It is a
15 doubt which a reasonable person would have after carefully
16 weighing all the evidence. It is a doubt which is sub-
17 stantial and not merely shadowy. It is a doubt which appeals
18 to your judgment, your reason, your experience, your common
19 sense.

20 Now, members of the jury, a reasonable doubt is
21 not an excuse to avoid the performance of an unpleasant duty.
22 It is not sympathy for a defendant. A reasonable doubt is
23 not a vague, shadowy, speculative, imaginary doubt, but such
24 a doubt as would cause prudent persons to hesitate before
25 acting in matters of importance to themselves.

Proof beyond a reasonable doubt does not mean proof to a positive certainty or beyond all possible doubt. If that were the rule few men or women, however guilty, would ever be convicted, because it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which is not by its nature capable of being proved to a mathematical certainty.

In consequence, the law in a criminal case is that it is sufficient that the guilt of a defendant be proved beyond a reasonable doubt and not beyond all possible doubt.

Members of the jury, as I said, four counts of the indictment are being submitted for the jury's verdict: Counts 2, 3, 4, and 5. The fact that other counts are not being submitted to the jury is a matter of law with which the jury has no concern. It is irrelevant to the duty of the jury to decide as to the four counts submitted.

In Counts 2, 3, 4, and 5 of the indictment the Government does not claim that the defendant, Mr. Rivera, actually robbed or assaulted Agent Castillo, or that the defendant Rivera carried a gun during the commission of these offenses charged. Rather, as you have heard, the Government contends that Rivera aided and abetted Fontanez in the robbing and assaulting, and that Fontanez carried a

gun during the course of those offenses. Fontanez, for reasons with which the jury again has no concern, is not here on trial. Rivera is the only defendant on trial and his guilt or innocence is to be determined solely on the evidence, or lack of evidence, as against him.

For the jury's benefit, I am going first to explain the four separate counts and the law applicable, and then at one time I'm going to explain the law of aiding and abetting, because, as you have heard, that is the law on which the Government relies to establish its case against Rivera. Rivera is the one the Government contends aided and abetted Fontanez and, of course, the defendant, as you have heard, denies absolutely that he aided and abetted Fontanez.

I am going to read first the second count, and I should say that the jury should not try to remember the details of these counts because I am going to give to Madam Foreman at the end this copy of the indictment for your convenient use during your deliberations.

But this is the second count, Count 2, robbery of money of the United States:

The grand jury further charges on or about the 18th day of October, 1974, in the Southern District of New York -- and that includes Bronx County, New York County, the island of Manhattan -- Rafael Fontanez and Adolpho Rivera,

the defendants, unlawfully, willfully and knowingly did assault Jerry Castillo, a person having lawful charge, control and custody of money and property of the United States, to wit, \$14,000 of official advanced funds, with intent to rob, steal, and purloin such money and property of the United States.

Under this Count 2, in order to find the defendant Rivera guilty, you must find beyond a reasonable doubt these three essential elements:

First, that Jerry Castillo had lawful charge, control, or custody of the moneys of the United States;

Second, that Fontanez assaulted Castillo with intent by robbery to obtain such moneys; and

Third, that the defendant Rivera unlawfully, willfully, and knowingly aided and abetted Fontanez in the assault and the attempted robbery.

The term "custody" means the care and keeping of a thing.

The expression "to have charge of a thing" means to be responsible for it or to have a duty or obligation with respect to the thing.

The word "control" when used to show a relationship with the thing means the right to exercise a directing or governing influence over the thing.

1
2 An "assault" is a willful attempt or threat to
3 inflict injury upon the person of another coupled with an
4 apparent present ability to do so.

5 The term "robbery" is defined as the unlawful
6 taking of property from the person or possession of a person
7 against his will by means of actual or threatened force or
8 violence or fear of injury, immediate or future, to his
9 personal property.

10 Under this second count you have heard that
11 Fontanez must be found to have intended by robbery to obtain
12 money from Castillo, but it is not necessary for the
13 Government to prove that he, Fontanez, or Rivera, knew that
14 the money belonged to the United States or that Castillo was
15 a federal officer.

16 The final element under the second count is that
17 this defendant Rivera unlawfully, knowingly and willfully
18 aided and abetted Fontanez in the attempted robbery, and,
19 as I explained, I will cover at one time the law of aiding
20 and abetting, because that is a common element of all four
21 of the counts submitted to the jury.

22 But I would explain at this point what "knowingly"
23 and "willfully" means as those terms are used in the law.
24 To do an act "knowingly" means to do it voluntarily and
25 intentionally and not because of mistake, or accident, or some

other such innocent reason.

To do an act "willfully" means to do it knowingly and deliberately and with a bad purpose and motive.

In determining whether a defendant has acted willfully, it is not necessary for the Government to establish that the defendant knew that he was breaking any particular law. To do an act unlawfully simply means doing something which is against the law.

Now, members of the jury, intent is a matter important to all four counts, and I cover intent here at one time. Intent involves a person's state of mind, and while this is a fact, it is a fact which it is impossible to prove by direct evidence short of an express admission of a defendant. This is because you cannot look into a person's mind and determine and see what his intent was. However, like any other fact, intent may be proved by circumstantial evidence and proof of the circumstances surrounding the transaction may supply an adequate and convincing basis for a finding as to intent.

Toward the end of these instructions I will later have occasion to say a few words about direct evidence and circumstantial evidence.

We have covered Count 2, and as I will have occasion to emphasize, Count 2 and Count 3 are related to

each other. If the jury finds the defendant not guilty on Count 2, then the jury should not consider Count 3. This is because a defendant cannot be guilty on Count 3 unless he is guilty on Count 2. In substance Count 3 charges an aggravated form of the offense charged in Count 2.

You need not try to remember these instructions in detail, because in addition to the indictment, I am also going to give to Madam Foreman a memorandum for use on returning the verdict, and in this memorandum this point will be explained. Of course, the consideration of these counts is entirely up to the jury, the order in which you consider them; but I suggest you consider Count 2 first.

If your verdict on Count 2 is not guilty, then you don't consider Count 3.

If your verdict on Count 2, however, is guilty, then the jury should consider Count 3, which reads as follows:

Count 3, use of a dangerous weapon:

The grand jury further charges on or about the 18th of October, 1974, in the Southern District of New York, Rafael Fontanez and Adolpho Rivera, the defendants, in effecting and attempting to effect the robbery charged in Count 2 of this indictment, unlawfully, willfully, and knowingly did put in jeopardy the life of Jerry Castillo by use of a dangerous weapon, to wit, a .38 caliber revolver.

In order to find the defendant guilty of the charge in Count 3 you must find in addition to finding him guilty on Count 2 that in committing or attempting to commit the robbery charged in Count 2, Fontanez put Castillo's life in jeopardy by the use of a dangerous weapon, namely, a .38 caliber revolver, a dangerous weapon; a loaded revolver is obviously a dangerous weapon.

In order for you to convict the defendant on this Count 3, you must find beyond a reasonable doubt that Castillo's life was put in jeopardy by the use of the revolver; that this was done in effecting or attempting to effect the robbery charged in Count 2, and that it was done unlawfully, willfully and knowingly, as those terms have already been explained.

In order for a person's life to be put in jeopardy, you must be convinced beyond a reasonable doubt that the person was actually in danger of being killed. Mere fear on the part of the person that he might be killed does not suffice. To put a person's life in jeopardy requires an objective state of danger, not a subjective feeling of fear.

Members of the jury, as you have seen, the second and third counts are related to each other. In the same way, so, also, the fourth and fifth counts are related to each other. Whatever your verdict is as to Counts 2 and 3, you

must consider Count 4, which reads as follows:

Count 4, assault on a federal officer and employee:

The grand jury further charges on or about the 18th of October, 1974, in the Southern District of New York, Rafael Fontanez and Adolpho Rivera, the defendants, unlawfully, willfully and knowingly did forcibly assault, resist, oppose, impede, intimidate and **interfere with Jerry Castillo**, an officer and employee of the Drug Enforcement Administration while Jerry Castillo was engaged in and on account of the performance of his official duties.

Under this Count 4, in order to find the defendant Rivera guilty, you must find beyond a reasonable doubt the following elements:

First, that on October 18, 1974, Castillo was employed by the Drug Enforcement Administration and at the time of the commission of the acts charged, Castillo was engaged in the performance of his official duties;

Second, that on that same date, October 18, 1974, while Castillo was engaged in the performance of his official duties, Fontanez forcibly assaulted, forcibly opposed, or forcibly resisted, or forcibly impeded, or forcibly intimidated or forcibly interfered with Castillo. It is not necessary for the Government to prove that Fontanez or

Rivera knew that Castillo was a federal officer. It is not necessary that the Government prove that each of the acts was committed. It is sufficient if you find beyond a reasonable doubt that one or more of the acts, that is, assault, or resistance, or opposition, or impediment, or intimidation, or interference was forcibly committed.

Now the third essential element, that Fontanez willfully did the act or acts charged;

The fourth element, that the defendant Rivera willfully and knowingly aided and abetted Fontanez in his acts against Castillo.

You remember I already explained an assault. The word "resist" means to oppose by physical power, to strive against, to counteract, to defeat or frustrate.

To "oppose" means to resist by physical means.

To "impede" is defined as stopping progress, to obstruct, to hinder.

"Intimidate" is defined as to make one timid or fearful, to inspire or effect with fear, to frighten, deter, to overawe.

"Interfere" means to come in collision with, to intermeddle, to hinder, to interpose, to intervene.

Those are the terms that are used in Count 4 and in the law.

If the jury finds the defendant Rivera not guilty on Count 4, then the jury should not consider Count 5. This is because the defendant cannot be guilty on Count 5 unless he is guilty on Count 4. In substance, Count 5 charges an aggravated form of the offense charged in Count 4.

If, however, the jury finds the defendant guilty on Count 4, then the jury should consider Count 5, which reads as follows:

Count 5, use of a deadly and dangerous weapon:

The grand jury further charges on or about the 18th day of October, 1974, in the Southern District of New York, Rafael Fontanez and Adolpho Rivera, the defendants, unlawfully, willfully, and knowingly, did in the commission of the acts charged in Count 4 of this indictment use a deadly and dangerous weapon.

In order to find the defendant, Mr. Rivera, guilty of this charge in Count 5, you must find in addition to finding him guilty on Count 4 that in committing the offense charged in Count 4, Fontanez used a dangerous weapon, namely, a .38 caliber revolver. You must find that this revolver was used in the commission of the offense charged in Count 4 and that it was done unlawfully, willfully, and knowingly.

Now, members of the jury, having completed an

1
2 explanation of the four separate counts, we come to the law
3 of aiding and abetting, which is an element under each of the
4 counts.

5 The issue for you is whether Rivera, who was not
6 charged by the Government with the actual robbing or
7 attempting to rob or assaulting of Castillo, or with the use
8 of a gun in commission of these offenses, is guilty of these
9 offenses nonetheless as an aider and abetter. The
10 Government contends that he is guilty because he aided and
11 abetted Fontanez in the commission of those offenses charged.

12 In order for the Government to prove this aiding
13 and abetting, it is not necessary for the Government to show
14 that Rivera personally tried to rob Castillo or that he
15 personally assaulted Castillo; nor is it necessary for the
16 Government to show that Rivera possessed a gun during the
17 commission of those offenses charged. The Government must
18 show only that Fontanez did the robbing or attempting to
19 rob, the assaulting, the interference, etcetera, that
20 Fontanez carried a gun, and that Rivera aided and abetted
21 Fontanez in those acts.

22 The Government relies on a law of Congress which
23 reads as follows:

24 Principals: (a) Whoever commits an offense
25 against the United States or aids, abets, counsels, commands,

induces, or procures its commission, is punishable as a principal;

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

This means that not only is the person who commits an illegal act the person usually called the principal guilty, but anyone who aids and abets him in the commission of the act is likewise guilty of committing that illegal act.

In this instance Fontanez is the principal, and the defendant Rivera is charged in the indictment under the aiding and abetting law, which I just read. In order to find that the defendant Rivera aided and abetted Fontanez to commit the offenses charged in these four counts, you must find that the defendant Rivera in some way associated himself with the criminal venture; that he participated in it as something that he wished to bring about; that he, by his act or acts endeavored to make it succeed.

In determining this question you may consider whether the defendant Rivera had joined with Fontanez in a criminal venture, a plan, a partnership, to rob or to kill or to assault. This participation by the defendant Rivera

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2 may be shown by any act designed to promote or further the
3 criminal venture, even of relatively slight importance,
4 which you find was committed by the defendant Rivera.

5 But to find the defendant, Mr. Rivera, guilty
6 of aiding and abetting you must find something more than
7 mere knowledge on his part that the crime was being
8 committed, since a mere spectator at a crime is not a
9 participant. I repeat, however, that it is not necessary to
10 find that Rivera himself did any of the acts, since parti-
11 cipation in a crime can, for example, be found if you find
12 that Rivera aided and abetted Fontanez in the commission of
13 the crimes.

14 Members of the jury, I have emphasized this
15 morning, and I think yesterday, that the jury alone decides
16 all issues of fact which, of course, involves passing on the
17 credibility of witnesses. How do you determine whether you
18 believe a witness, or whether the witnesses are telling the
19 truth? You use your ordinary common sense which you by no
20 means leave behind you when you come here to the courtroom
21 and when you retire to deliberate in the jury room. You
22 draw on your experience, your meeting and dealing with people
23 in everyday business and social life. In passing upon the
24 credibility of a witness you take into account any incon-
25 sistencies or contradictions, conflict of testimony of other

witnesses, the demeanor of the witness. Demeanor on the witness stand is also a factor to be considered by the jury in determining what degree of credit to give a witness: the relationship to the controversy; the bias or impartiality of the witness' testimony; the strength or weakness of recollection.

And so, you observed the witnesses, you heard them. Did they seem frank, open, truthful, and candid? You take each witness and on the basis of your everyday experience you determine whether you believe the witness and to what extent you believe the witness.

You may consider whether any witness has any interest in the matter or any interest which might affect his testimony. If a witness has an interest, you may consider this in weighing the testimony. An interested or motivated witness is not necessarily unworthy of belief. It is only a factor to be considered by the jury in determining what weight to give his or her testimony.

Now, members of the jury, the law permits but does not require a defendant to testify in his own behalf. This defendant, Mr. Rivera, has taken this witness stand and has testified. Obviously a defendant has a deep, personal interest in the result of his prosecution. In fact, it seems clear that he has the greatest interest of all.

2 Interest creates a motive for false testimony.
3 The greater the interest, the stronger the motive, and the
4 interest of a defendant in the result of his criminal trial
5 is of a character possessed by no other witness. In
6 appraising his credibility you may take this fact of interest
7 into account. However, it by no means follows that simply
8 because a person has a vital interest in the outcome that
9 he is not capable of giving a truthful account of events.

10 It is for you, the jury, to decide to what
11 extent if at all his interest has affected or colored his
12 testimony.

13 Evidence that a witness has one or more previous
14 criminal convictions may be considered by the jury in
15 weighing the credibility of that witness. That a person has
16 such a conviction or convictions does not mean that he cannot
17 tell the truth. It is simply a factor for the jury to con-
18 sider in determining credibility.

19 You have heard reference earlier to direct
20 evidence and circumstantial evidence.

21 Direct evidence is where a witness testifies to
22 what he saw, heard, observed, what he knows of his own
23 knowledge, something that comes to him by virtue of his
24 senses.

25 Circumstantial evidence is evidence of facts

and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

I use often a fairly simple illustration of what is meant by circumstantial evidence. You doubtless remember the old story of Robinson Crusoe and how one day Crusoe found and saw footprints in the sand on the beach. Crusoe did not see any man walking on the beach but he drew an inference from the fact of the footprints that a man had been walking on the beach. The footprints were circumstantial evidence. That's about all there is to circumstantial evidence. You infer on the basis of reason and experience from an established fact the existence of some other fact.

Members of the jury, I come to the end of these instructions and say to you in conclusion that each of you jurors is entitled to his or her own opinion. You should, however, exchange views amongst yourselves each with your fellow jurors. That is the very purpose of jury deliberation, to discuss and consider the evidence, to listen to the arguments of your fellow jurors, to present your individual views, to consult with one another, and to reach an agreement based solely and wholly on the evidence if you can do so without violence to your own individual judgment.

Each one must decide the case for himself or herself after consideration with your fellow jurors of the

evidence in the case, but you should not hesitate to exchange an opinion which, after discussion with your fellow jurors appears to be mistaken in the light of the discussion viewed against the evidence and the law. However, if after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view which differs from the others, you are not to yield your conviction simply because you are outnumbered or outweighed. Your final vote must reflect your conscientious conviction as to how the issues should be decided.

Members of the jury, any verdict must be unanimous; that is, as to each count the verdict must be unanimous.

The jury is not to consider, or in any way to speculate, upon the punishment which may be imposed upon the defendant if he is found guilty. Under your oath as jurors you cannot allow a consideration of a punishment which may be imposed upon the defendant if he is convicted to influence your verdict in any way or in any sense to enter into your deliberations. The function of a **jury** is to determine the guilt or innocence of a defendant on the basis of the evidence and the instructions of the Court. It is the Judge alone, the Court, who has the duty of determining the sentence, if there is a conviction.

Ladies and gentlemen, the charges here, as you must appreciate, are most serious. A just determination of this case is important to the public. It is equally important to this defendant, Mr. Rivera. Under your oath as jurors you must decide the case without fear or favor and solely, as I have said any number of times, on the evidence and the law.

If the Government has failed to carry its burden of proof as to any count or counts against the defendant, your sworn duty is to bring in a verdict of not guilty on such counts or count. If the Government has carried its burden as to any count or counts as to this defendant, Mr. Rivera, you must not flinch from your sworn duty and you must bring in a verdict of guilty on such count or counts.

The guilt or innocence of the defendant is for you and you alone to determine. The Government to prevail must prove the essential elements by the required degree of proof. If it succeeded, your verdict must be guilty; and if it failed, your verdict must be not guilty.

Each count of the indictment, the four counts, 2, 3, 4, and 5, should be considered separately. 3 and 5 are to be considered only if you find that as to 2 and 4, that the defendant is guilty.

Therefore you may find the defendant not guilty on all counts, guilty on all counts, or guilty on some counts and not guilty on other counts.

I am not suggesting any of these alternatives. I am only trying to point out and make clear that you must consider the four counts separately.

I am giving Madam Foreman a copy of the indictment for the convenient use of the jury in considering the several counts. The indictment is not evidence. The defendant has pleaded not guilty to the charges in the indictment.

I am also giving to Madam Foreman a form to be used simply as a guide for returning a verdict on each count as to the defendant. This form is not to be signed. It is only for your convenient use.

Your verdict will be returned orally by Madam Forelady in open court and, of course, it goes without saying, that the form of this memorandum is not intended to, nor should it in any way, influence your verdict. In this connection I remind the jury, again, that Counts 2 and 3 are related to each other and Counts 4 and 5 are related to each other.

You must consider and return a verdict, in any event, on Counts 2 and 4.

1 PGd
2 If your verdict on Count 2 is not guilty, then
3 you should not consider Count 3.

4 If your verdict on Count 2 is guilty, you should
5 consider and return a verdict on Count 3, which, you under-
6 stand, is an aggravated type of offense charged in Count 2.

7 If your verdict on Count 4 is not guilty, you
8 should not consider Count 5. If, however, your verdict on
9 Count 4 is guilty, you should consider and return a verdict
10 on Count 5 which, you understand, is an aggravated type of
11 offense charged in Count 4.

12 I have hoped in the form of this memorandum to
13 indicate to you what I have just explained as to the
14 relationship of Counts 2 and 3 and the relationship between
15 Counts 4 and 5.

16 If during your deliberations you wish to see any
17 of the exhibits, Madam Forelady should send out a note by a
18 marshal and we will send in the requested exhibits to you.

#29 19 If you should wish any testimony read to you,
20 likewise send a request through the marshal and your request
21 will be considered and, if granted, as it usually is,
22 arrangements will be made.

23 Members of the jury, we have reached that point
24 in the trial where we must excuse the two alternate jurors.
25 This, of course, has been a short trial, but one can never

1
2 tell when some emergency arises which requires that one of
3 the twelve jurors be excused. If such an emergency arises
4 and we don't have alternate jurors, you understand we have
5 to stop the trial and start all over again with a new jury;
6 so for that reason we have alternate jurors who, I hope,
7 you understand, perform just as valuable and essential a
8 function as if you were members of the twelve who deliberate.

9 We will excuse you now and you can take your
10 things from the jury room so that you will be removed from
11 the jury room when the twelve jurors retire to deliberate.

12 Thank you.

13 Members of the jury, be patient for just a few
14 moments in silence while I see counsel at the side-bar for
15 any last minute questions of law.

16 (At the side-bar.)

17 THE COURT: Are there any exceptions?

18 MR. FORTUIN: The Government has no exceptions.

19 THE COURT: Miss Gerling?

20 MISS GERLING: No exceptions.

21 THE COURT: Thank you.

22 (In open court.)

23 THE COURT: Mr. Clerk, swear the marshals.

24 (Marshals sworn.)

25 THE COURT: Members of the jury, the marshals

will accompany you to the jury room. This matter is submitted to you for your decision. You may retire.

(The jury retired to deliberate at 11:00 a.m.)

THE COURT: Mr. Clerk, would you mark as a Court exhibit a copy of the memorandum which we have given to the jury foreman.

(Court Exhibit 1 marked.)

THE COURT: Would you give copies of the memorandum to the attorneys, please.

We will wait the pleasure of the jury.

(At 12:20 p.m., the following proceedings took place:)

THE COURT: We have two notes from the jury:

"We want the testimony of Castillo at the time when the two men were returning to the car with the bag, 196th Street, Colonial Avenue."

The other just says "definition of reasonable doubt." That's the second note: "Definition of aiding and abetting."

I think, for one thing, we ought to send the jury to lunch. I don't think we'd better try to do all this before lunch.

We had planned to send them to lunch at 12:30. Will you tell the marshal to take them to lunch at 12:30 or

now, if he can.

Tell the jury that we will answer the notes the first thing after lunch.

The rest of the first note is: "We also want all of Rivera's testimony."

Again, the first note says: "One, we want the testimony of Castillo at the time the two men returned to the car with the bag; two, we also want all of Rivera's testimony."

The Rivera testimony is no problem. They want it all.

Couldn't we, off the record, agree what part of the testimony of Castillo relates to the time when the two men returned to the car with the bag?

MISS GERLING: I believe the part where he sees them through the rear-view mirror on.

THE COURT: Unless I have the reporter read it all now, there is no mechanical way I know for isolating this part of it. I had hoped that you could, off the record, let the reporter run through his notes and agree to it.

MISS GERLING: Whatever you say, Judge.

THE COURT: The alternative is to have him start in and read it all. Do you want him to do that?

MISS GERLING: I don't understand, your Honor. What do you want me to agree on, Judge?

1
2 THE COURT: I want you to agree on that part,
3 if you can, of the testimony of Castillo which answers the
4 note of the jury. You can have the note.

5 MISS GERLING: You want me to agree with the
6 United States Attorney?

7 THE COURT: Forget it. I will do it myself.
8 Just forget it.

9 (Luncheon recess.)

10 (At 2:00 p.m. the following proceedings took
11 place:)

12 (Jury in box.)

13 THE COURT: Members of the jury, we have your
14 notes and we have arranged to answer them.

15 The first note has two requests for testimony
16 and the first of those two requests is: "We want the
17 testimony of Castillo at the time when the two men returned
18 to the car with the bag, 196th Street, Colonial Avenue."

19 The procedure for giving you such testimony is
20 to have the reporter read the questions and answers to the
21 jury. The reporter, with my assistance, has located the
22 portions of those notes which he is now going to read to you.
23 We are going to read from both the direct examination by
24 the Assistant United States Attorney and also from the cross-
25 examination of the same subject. We are prepared to read all

1 of the testimony that we think relates to your request, but,
2 if at any time, Madam Forelady, you think that the jury has
3 heard all of the testimony it wants to hear, simply raise
4 your arm and I will ask the jury and we will stop. We don't
5 want to shorten it in any way, but we just give you that
6 method of expressing a time when you think the jury has
7 heard everything that jury wants to hear on this subject.
8

9 (Record read.)

10 THE COURT: That's the testimony as we find it
11 of Castillo at the time when the two men returned to the car
12 with the bag.

13 The second testimony the jury asked for is all
14 of Rivera's testimony.

15 (Record read.)

16 THE COURT: We think we have satisfied and
17 answered the jury's first note.

18 The jury asked in the second note two questions.
19 The first is for a definition of reasonable doubt.

20 Of course, it will be impossible to repeat
21 exactly what I said this morning, because I rely on notes,
22 but I deliver these instructions from some experience. I
23 think I can repeat the substance of what I told the jury
24 reasonable doubt meant.

25 It is a doubt founded on reason, and it arises

out of the evidence in the case or lack of evidence. It is a doubt which a reasonable person has after weighing all the testimony. It is a doubt which is substantial and not merely shadowy. A reasonable doubt is one which appeals to your reason, your common sense, your experience, your judgment. It is not an excuse to avoid the performance of an unpleasant duty; it is not sympathy for a defendant. A reasonable doubt is not a vague, speculative, imaginary doubt; but such a doubt as would cause prudent people to hesitate before acting in matters of importance to themselves.

Proof beyond a reasonable doubt does not mean proof to a positive certainty or beyond all possible doubt. If that were the rule, few men or women, however guilty, would ever be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which is not capable of being proved to a mathematical certainty, and it is for that reason that the law in criminal cases is that it is sufficient that the guilt of a defendant be proved beyond a reasonable doubt and not beyond all possible doubt.

The jury also asked for, as the note says, a definition of "aiding and abetting."

The statutory provision about aiding and abetting is found in Section 2. It really makes no

1 difference, the section numbers, but it is found in the
2 section of the Criminal Code of the United States and it
3 reads as follows:
4

#30 5 "Principals: (a) Whoever commits an offense
6 against the United States or aids, abets, counsels, commands,
7 induces, or procures its commission is punishable as a
8 principal;

9 "(b) Whoever willfully causes an act to be
10 done which **if** directly performed by him or another
11 would be an offense against the United States is punishable
12 as a principal."

13 This statute means that not only is the person
14 who commits an illegal act usually called the principal
15 guilty, but anyone who aids or abets in the commission of
16 the act is likewise guilty of committing the illegal act.
17 In this instance in the case on trial Fontanez is the
18 principal and the defendant, Mr. Rivera, is charged in the
19 indictment under the aiding and abetting law which I read.

20 In order to find that the defendant Rivera aided,
21 helped, abetted, assisted -- they all mean substantially the
22 same thing -- Fontanez to commit the offenses charged in the
23 four counts which the jury is considering, you must find
24 that the defendant Rivera in some way associated himself
25 with the enterprise, with the criminal venture, that he

1 participated in it as something he wished to bring about,
2 that he, by his act or acts, endeavored, helped, attempted
3 to make it succeed.
4

5 In determining the question of aiding and
6 abetting, you may consider whether the defendant, Mr. Rivera,
7 had joined with Fontanez in a plan, a partnership, a
8 criminal venture to rob, or assault, or harm the man with
9 whom Fontanez was dealing who turned out to be Agent
10 Castillo.

11 This participation by the defendant, Mr. Rivera,
12 may be shown by any act intended to promote or further the
13 criminal venture, even of relatively slight importance,
14 which you find was committed by the defendant Rivera, but
15 to find Rivera guilty of aiding and abetting there must be
16 something more than mere knowledge that a crime is being
17 committed because a spectator, a mere onlooker at a crime,
18 is not a participant.

19 It is not necessary, of course, to find that
20 Rivera himself did directly any of the principal acts of the
21 offense, the attempting to rob or robbing or assaulting or
22 interfering with Castillo because participation in the
23 crime in the sense of the aiding and abetting statute may
24 be found if you find that Rivera aided, helped, assisted
25 Fontanez in the commission of the crime.

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2

I hope we have helped the jury by these answers.

3

The jury may retire and continue their deliber-

4

ations.

Certificate of Service

May 16, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Jonathan J. Silbermann